

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

Served: January 13, 1993

FAA Order No. 93-2

In the Matter of:

MICHAEL EDWARD WENDT

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) Docket No. CP92GL0418  
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ORDER

Respondent has moved for an extension of time for filing his appeal brief in this case involving the Equal Access to Justice Act (EAJA).

On March 3, 1988, Respondent Michael Wendt, as pilot-in-command of Britt Airways Flight 724, crossed an active runway at Indianapolis International Airport contrary to air traffic control instructions. An action was initiated against him under the Civil Penalty Demonstration Program. A Department of Transportation (DOT) law judge found that Respondent violated the regulations alleged in the complaint, but on appeal, the Administrator of the Federal Aviation Administration (FAA) reversed. In the Matter of Wendt, FAA Order No. 92-40 (June 15, 1992).

As the prevailing party, Respondent filed an application for attorney fees and other expenses under the EAJA<sup>1/</sup> and the FAA's implementing regulations<sup>2/</sup> on August 28, 1992, claiming that the agency's position in the proceeding was not substantially justified. A DOT law judge denied Respondent's application on October 26, 1992. Respondent filed a notice of appeal with both the Administrator and the National Transportation Safety Board (NTSB) three days later.

On November 30, 1992, Respondent moved for a ruling on whether the Administrator or the NTSB has jurisdiction over his EAJA appeal. Respondent claimed that the status of the case

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<sup>1/</sup> 5 U.S.C. § 504.

<sup>2/</sup> 14 C.F.R. Part 14.

was unclear due to the statutory transfer of appellate jurisdiction over pilot cases from the Administrator to the NTSB.<sup>3/</sup> Respondent also asked for a "briefing schedule" from the tribunal determined to have jurisdiction.

On December 17, 1992, the Administrator issued FAA Order No. 92-74 advising Respondent that under the 1992 Act, the Administrator rather than the NTSB has jurisdiction over his appeal. The Administrator also advised Respondent that under the Rules of Practice, Respondent's appeal brief was due no later than December 21, 1992.<sup>4/</sup> The Administrator's order was served on the parties on December 21, 1992.

Respondent failed to file his appeal brief by the deadline. Respondent now moves for an extension of time, arguing that the Administrator's order was served on him the same day that his brief was due and it was impossible for him to know the due date before he received the Administrator's order.

The certified mail return receipt in the record indicates that counsel's office received the Administrator's order on December 22, 1992. Counsel for Respondent, however, states that she did not receive the Administrator's order until December 30, 1992. Counsel does not explain why she did not receive the order until December 30, 1992, when it was received by her office on December 22, 1992. In any event, counsel did not receive the Administrator's order before the deadline for filing the brief. Counsel asks that she be given 5 business days from the date she received the Administrator's order to file her brief, or until January 8, 1993.<sup>5/</sup>

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<sup>3/</sup> Shortly after the lapse of the Demonstration Program on August 1, 1992, the FAA Civil Penalty Administrative Assessment Act of 1992, P.L. No. 102-345, 106 Stat. 923 [the 1992 Act], became law when it was signed by the President on August 26, 1992. The 1992 Act made permanent the Administrator's authority to assess civil penalties not exceeding \$50,000 for violations of the Federal Aviation Act of 1958, as amended. Jurisdiction to decide appeals arising from violations occurring after August 26, 1992, involving pilots, flight engineers, mechanics, and repairmen was transferred under the 1992 Act from the Administrator to the NTSB.


<sup>4/</sup> Complainant has argued that Respondent's brief was untimely in that it was not filed by December 15, 1992, 50 days from the date of the initial decision. Complainant has apparently overlooked 14 C.F.R. § 13.211(e), which gives the Respondent additional days to file his appeal brief because the initial decision was served on him by mail.

<sup>5/</sup> Counsel miscalculated. Five business days from December 30, 1992, is January 7, 1993.

Counsel's argument that she had no way of knowing the due date of the brief before receiving the Administrator's order is without merit. Counsel had only to look up in the Rules of Practice to determine the due date. The Rules of Practice do not provide for the issuance of a "briefing schedule." They provide that a brief is due 50 days from the date of the initial decision, with an additional 5 days if the decision was served by mail. Counsel is not new to practice before the Administrator. She should be familiar with the Rules of Practice, and should know the deadline for filing an appeal brief.

A prudent attorney would not have waited for the Administrator's ruling on jurisdiction, but would have filed either a request for extension of time or the appeal brief before the deadline for filing the brief. Nevertheless, Respondent is granted an additional 10 days from the date of service of this order to file an appeal brief. Counsel for Respondent is advised that, barring extraordinary circumstances, any further delay in filing the appeal brief will result in dismissal.

THOMAS C. RICHARDS, ADMINISTRATOR  
Federal Aviation Administration

  
JAMES S. DILLMAN\*  
Assistant Chief Counsel

Issued this 13th day of January, 1992.

\* Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated January 29, 1990, under 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202. See 55 Fed. Reg. 15,094 (1990).